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UPPAC



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CYBERBULLYING AND THE FIRST AMENDMENT: *When Can We Discipline for Off-campus Speech?*

Last month's *School Law Update* featured best practices to deal with bullying at your school. A variation on the theme, this month's article focuses on cyberbullying, and more specifically, offers a legal perspective on when disciplining for bullying that occurs off campus in the wilds of cyberspace is appropriate and when it is not.

The primary challenge to disciplinary action taken against students engaged in cyberbullying is that the school's actions violate the student's First Amendment rights. Cyberbullying cases have been by the student who was disciplined, and who argue that the school district has no place punishing him for what he says and does off campus, i.e., on the internet. Most courts hearing these cases pull from the very first landmark student free-speech case, Tinker v. Des Moines, in 1969, in which the Supreme Court stated, "A student can express his opinion, even on controversial subjects, so long as doing so **does not materially and substantially disrupt or interfere** with the requirements of appropriate disci-

pline in the operation of a school." The Court further held in this case that "School discipline is appropriate where the facts **reasonably lead school authorities to forecast substantial disruption or material interference with school activities.**"

Since 1969, the Supreme Court has reviewed a handful of student free speech cases and has applied the Tinker standard across the board. While a cyberbullying case has yet to reach the Supreme Court, state and district courts across the country are looking to Tinker to resolve the question of whether discipline violated a student's First Amendment rights. The bottom line, courts are asking, "Did the speech create, or was it reasonably likely to create, a substantial disruption or material interference of school activities?"

Most cases involving cyberbullying have NOT been student-on-student bullying. Rather, the cases typically involve a student posting something critical or derogatory of staff or administrators. The following illustrate the cases reviewed by courts:

- Beussink v. Woodland R-IV Sch. Dist. (1998) Court overturned

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the 10 day suspension of a student who created a website that used crude and vulgar language in criticizing the school administrator, court found the site did not cause disruption in school.

- Emmett v. Kenty Sch. Dist. (2000): A student created an “Unofficial Kentlake High Home Page” which allowed visitors to vote on who should be the next to die. The school expelled the student, and court ruled in favor of the student, holding that the school had not proved the

2 website intended to threaten anyone.

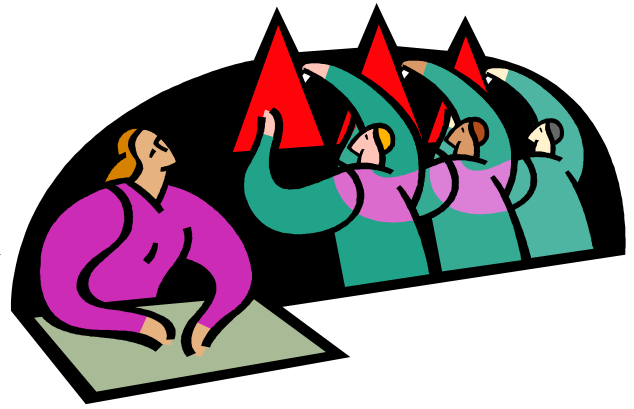
- I.S. v. Bethlehem Area Sch. Dist. (2000) Court upheld expulsion of a student who created a website that contained threatening comments about a teacher and that solicited donations from site visitors to hire a hit-man to take out the teacher. The court observed that students at the school were discussing the website and the teacher was unable to finish the academic year, taking a medical leave of absence. Because the off campus speech “materially and substantially interferes with the educational process,” school officials may discipline students who created the website.
- Killion v. Franklin Regional Sch. Dist. (2001) Court ruled in favor of a student

who wrote an e-mail about the school’s activities director that was very unflattering about his weight. The court noted that even though the mere desire of school officials to avoid discomfort did not justify a restriction of private speech, the school could have prevailed if it had demonstrated a **well-founded expectation of disruption**.

- Layshock v. Hermitage Sch. Dist. (2011): (3d Circuit) Court overturned the suspension of a student who created an unflattering parody profile of his principal on MySpace.com.

In last month’s issue, the Case of the Month was the only student-on-student cyberbullying case of which UPPAC is aware. In J.C. v. Beverly School Unified, the California court held that the school did not show that the student’s YouTube video which mocked a classmate caused a disruption substantial enough to justify the school’s suspending the student who created it. The factors the court looked at in coming to this conclusion were identified in last month’s issue, but are worth repeating this month, in terms schools and district can use to help make these tough decisions:

1. Was the content of the online post violent?
2. Is there a history of violence from the student who posted it?
3. How much of the school day was taken investigating the situation?
4. If there were witnesses, did interviews with these witness-



es interfere with instructional time for a majority of the students?

5. Was there a confrontation between the perpetrator and the victim about what was posted online?
6. Was the incident of the online post resolved? How long did it take to fully resolve?
7. Were teachers’ class activities affected by the online activity?
8. Did the post create a widespread whispering campaign at the school?
9. Was the post viewed on a school computer or a smartphone, accessing the school’s internet system?
10. Was there discussion of the post during class, or did it otherwise disrupt school work?
11. Did the incident pull administrators away from their daily tasks or cause them to miss an activity or event they should have attended?
12. Is there any evidence of a prior relationship between the victim and the perpetrator that supports a prediction that a verbal or physical confrontation might occur?
13. Does the victim have an unstable social history that might suggest a breakdown, suicide attempt, or retaliation?
14. Has there ever been a situation similar to this that DID result in violence or near violence at the school in the past?

This is an evolving area of the law, and will likely develop further nuances as

APRIL UPPAC CASES

The State Board of Education suspended the license of Teresa Crandall for forcing an adult special needs student's head into a locker, and for being verbally and sometimes physically abusive with staff and adult special needs students.

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more and more courts review the cases. It is important to note that courts generally defer to schools in making these kinds of decisions, and if made in good faith with documentation to support a substantial disruption—or a reasonable likelihood of a substantial disruption—a school district has strong legal support no matter the decision.

RECENT COURT CASE

How much freedom of speech is too much for high school-age students? What about junior high school-age students? A junior high school newspaper writer recently asked our office why his high school principal could unilaterally veto the student's article in favor of sex education for secondary school students. How much unedited freedom can students (and their parents) expect when students are writing for school publications—or writing from home, using home computers and PDAs—about controversial topics?

YOUR QUESTIONS

Q: I am a third grade teacher. I was arrested last Sunday for a DUI. I was not handcuffed or taken to jail. I have a hearing in two weeks. Do I have to report the arrest to my employer? — *Utah Educator*

A: Yes. Regardless whether you plead guilty or not guilty or when your hearing is scheduled, you must report the arrest to your principal (or head school administrator) within 48 hours of the arrest. Your principal

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The US Supreme Court has spoken many times on this issue: In Tinker v. Des Moines Ind. Community School District (1969), the Court said that students' freedom of speech and expression rights do not end "at the school house gate," absent material interference with school purposes. In Bethel School District v. Fraser (1986), the Court said that student free speech rights are NOT co-extensive with adults' and that schools can restrict speech if they consider the speech to be lewd, vulgar, or indecent. Schools can also exercise editorial control over style and content of student speech in school-sponsored and subsidized publications, consistent with legitimate "pedagogical concerns" (Hazelwood School District v. Kuhlmeier—1988). Most recently, the US Supreme Court upheld a school's disciplining a student for displaying a banner encouraging or advertising drug use; the banner was displayed outside the school, during school time when students were released for an Olympic-related activity (Morse v. Frederick—2007).

The Second Circuit Court of Appeals recently explored the First Amendment rights of a 5th grade student who "expressed a wish for violence to the school and teachers." He was suspended for six days and the Second Circuit Court upheld his suspension. Here is his story: B.C. is a 5th grade student. His teacher asked the students to fill in a picture of an astronaut and write various things in sections of the astronaut. One section was to be completed with a "wish" from the students. The teacher said, "write, like, anything you want . . . you can involve a missile . . . [y]ou can write about missiles." B.C. wrote on his picture, "Blow up the school with the teachers in it." Most of the students laughed, but one student looked "very worried," and told the

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To Get a weekly roundup from
our blog, UtahPublicEducation.org,
click here:



must report the arrest to the Utah State Office of Education within an additional 48 hours, or as soon as possible. It is important that UPPAC reviews the incident because you are an active educator in the classroom.

Q: A child in my 2nd grade class has come to school three times in the last two months with excessive (it seems to me) bruises and scrapes on her legs and arms. Her arm is in a sling since last weekend. Should I report suspected child abuse to the Division of Child and Family Services? — *Second Grade Teacher*

A: You should use your professional judgment to determine if there is a reportable suspicion of abuse. The standard to report is "reason to believe" (about 10 percent likelihood). You should make the report **personally** (according to Utah law). You may also report to the school principal or school counselor, consistent with school/school district policy.

Q: I am a middle school teacher. I see students passing their phones around to share pictures on their phones. Sometimes I get a glimpse of the pictures—and they look "questionable" to me. Can I take the students' phones? Can I search the phones? The students are quick—they often turn them off if I ask to see the pictures or messages.—*Tired of Phones in My Classroom.*

A: If you are concerned with content being passed around, you can "search" the phone for the concern you identify when you take the phone. "Searches must be reasonable

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teacher about the drawing. When approached by the teacher, B.C. looked blank. When he was asked later what he meant by the drawing; B.C. said he didn't mean what he had written--he was only kidding.

However, B.C. had drawn another picture the previous year that the school staff perceived as "disturbing." This earlier drawing depicted a person firing a gun with a caption that he shot four people, they were dead and he wasted bullets on them. He had also written about a big wind that destroyed all schools and teachers and "kids" died. Both stories were reported and the school psychologist alerted B.C.'s parents. B.C. had other misbehavior and discipline issues (including pushing, shoving and rough play) during the year of the astronaut drawing.

The Second Circuit upheld the school's suspension, focusing on "the reasonableness of the school administration's response, not on the intent of the student." "... [I]n the context of student speech favoring violent conduct, it is not for courts to determine how school officials should respond. School administrators are in the best position to assess the potential for harm and act accordingly."

The Dissent was more dismissive of the student's conduct—B.C. did not have the capacity to carry out a threat to the school and the girl who initially reported the astronaut drawing to the teacher was a "tattletale." In short, the Dissent believed the school overreacted.

Perhaps the most important take-away for school administrators: "Courts have allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence." Administrators must be allowed to react quickly without worrying that they will face years of litigation second-guessing their judgment about "true threats" vs. "kidding."



in their **inception** and in their **scope**." You can look at a student's pictures on a phone (if that's what you saw that concerned you), but you can't look at all of a student's texts and contacts. Make yourself aware of your school's policy! If your school policy directs that you have the school resource officer conduct the search, obey the policy.

Q: My charter school is following the State Board's training and change over to the Utah Common Core Standards and Objectives. I personally think the Common Core is a Communist plot (same root words). Do I **have** to teach the Utah Common Core Standards? —*Educator Against the Core*

A: Yes. You are a charter school employee and a public employee. You have a strong directive to teach what your employer directs you to teach. USOE has created a [pamphlet about the Core Standards](#) which might be helpful in debunking your anxiety that it is a Communist conspiracy—it is not. On April 26, 2012 the State Board of Education is hosting a public forum. The event will be live streamed at <http://connect.schools.utah.gov/USBE>, and an archive of the event will be made available on the USOE Website.



UPPAC CASE OF THE MONTH

As high-stakes testing gains importance schools, districts, and states are intent on accurately assessing student progress. CRT's, DRA's, and Dibbel's play a vital role not only in complying with current state and federal law, but also in helping the classroom educator know where his students are and helping the educator plan accordingly. Of course, "high stakes testing", can—as the phrase suggests—create an atmosphere of pressure for schools and teachers as they recognize what is at stake if their students do not pass these tests. Sometimes this pressure leads teachers to take dishonest or unethical liberties with administering and/or scoring tests. For example, one UPPAC investigation found a teacher who changed the answers to two of her students' tests because, according to the teacher, she was worried her principal would be upset if the students scored low. Also problematic for this educator is the fact that she failed to provide appropriate accommodations for those students with IEPs or 504 plans.

This negligence, of course, taints the test scores, which cannot be used as appropriate measures of student achievement. In another testing violation case that came to UPPAC, one teacher graded sections of tests which the students had left completely blank. Making up scores where there is no work product is a serious violation of the Utah Educator Standards of Ethics, and invalidates scores which are used to measure student achievement. Another teacher failed to continue testing students through to the students' appropriate reading levels. Where certain standardized tests require the student to continue taking a lower level test until he reaches an "independent" score, this teacher stopped after the first test for each student, leaving no clear indicia of the students' appropriate reading levels. All of these schools were on "school improvement" plans for low test scores, which understandably added an element of pressure to these tests, but the importance of accurate reporting cannot be overstated. The ethical obligation to accurately and honestly administer and score tests is par for the course as a professional educator.

WHAT IS UPPAC?

UPPAC is a committee of nine educators and two community members charged with maintain and promoting a high standard of professional conduct and ethics among Utah teachers. It is advisory to the Utah State Board of Education in making recommendations regarding educator licensing and may take appropriate disciplinary action regarding educator misconduct.

The Government and Legislative Relations Section at the Utah State Office provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the State Office.